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IN THE

Supreme Court of the United States

October Term, 1953

UNITED STATES OF AMERICA, PETITIONER

v.

GUY W. CAPPS, INC.

BRIEF FOR APPELLEE

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Appellee.

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No. 331

IN THE

Supreme Court of the United States

October Term, 1953

UNITED STATES OF AMERICA, PETITIONER

v.

GUY W. CAPPS, INC.

BRIEF FOR APPELLEE

Appellee, Guy W. Capps, Inc., opposes the award of Certiorari and asserts that the judgment for defendant is plainly right.

OPINIONS BELOW

When complaint was filed by United States of America in the District Court for the Eastern District of Virginia, defendant moved to dismiss for failure to state a claim upon which relief could be granted, on the grounds—

1. That action was brought by the United States in its sovereign capacity to recover damages alleged to have been sustained while in the exercise of govern-

mental powers, whereas Congress has created no such rights of action and none exists under federal law.

2. That the trade agreement asserted to have existed between the United States and Canada (R. 152) was invalid.

3. That the asserted contract between the Canadian exporter and the defendant American importer was no contract in law, and if it was plaintiff was no beneficiary thereof, and even so the complaint showed on its face that same had not been breached.

4. That the complaint showed on its face that plaintiff had been caused no damages by defendant's alleged breach of said contract.

This motion to dismiss for failure to state a claim was overruled in a memorandum opinion reported at 100 F. Supp. 30. On the trial, at the conclusion of the plaintiff's evidence, the District Court sustained defendant's motion for a directed verdict. The oral opinion, delivered from the bench, is not reported but will be found at R. 147-149. The District Court found as a fact (a) that defendant importer had not diverted or reconsigned the Canadian seed potatoes for table stock (R. 148), and (b) that there was no causal connection between defendant's sale of such potatoes and any damage to the United States (R. 149). The opinion of the United States Court of Appeals (R. 164-170) has been reported at 204 F. 2d 655. It ignored the factual determinations made by the District Court and sustained the judgment for defendant on the grounds (a) that the trade agreement was invalid, and (b) that there is no authorization in federal law for the institution of this action nor for a recovery therein (204 F. 2d 660).

JURISDICTION

The Jurisdiction of this Court is admitted.

STATEMENT OF THE CASE

The United States and Canada exchanged notes at November 23rd, 1948, by the terms of which Canada agreed that it would grant no export permits for the shipment of Canadian seed potatoes to the United States (1) unless for each shipment the Canadian exporter gave evidence (to Canada) that he had a firm order from a legitimate United States user of Canadian seed potatoes, and (2) unless the Canadian exporter's contract with the United States importer contained an assurance that the Canadian seed potatoes *would not be diverted or reconsigned for table stock purposes.* Neither the United States nor Canada understood the term "user" to be limited to a United States grower of potatoes who planted the Canadian seed, and both understood that such term extended to any importer who customarily dealt in seed potatoes for resale. Respondent is a Virginia corporation which had been importing and selling Canadian seed potatoes as a part of its general business for a long period of years (R. 132). It held a Department of Agriculture license to import and deal in such commodity (R. 132). It qualified under the trade agreement as a "user" of Canadian seed potatoes because it had been importing and selling this commodity for a long period of years (R. 133), and that it was a legitimate "user" of Canadian seed potatoes within the terms of the agreement (R. 132). Respondent was never a grower of potatoes as is stated in the petition at the bottom of page 6, and the record does not so indicate at any point.

In December, 1948, respondent purchased 48,544 one hundred pound bags of Canadian No. 1 seed potatoes from H. B. Willis, Inc., at Charlottetown, Prince Edward Island, directing their consignment to the port of Jacksonville, Florida. After this cargo was loaded on the S. S. Empire Gangway, respondent wired Willis that these seed potatoes were for planting in Florida and Georgia (Ex. 2, R. 151). Upon arrival of the cargo at Jacksonville, respondent sold it *in the usual course of trade* to Atlantic Commission Company as *Canadian No. 1 seed potatoes* (R. 153). Atlantic Commission Company customarily bought and dealt in Canadian seed potatoes (R. 54). To satisfy customer demand for Canadian seed potatoes respondent repurchased 10,000 bags from Atlantic Commission Company, and as an importer resold these 10,000 bags to other wholesalers customarily dealing in Canadian seed potatoes, in every instance as Canadian No. 1 seed potatoes (plaintiff's Ex. 4, R. 152). Of the 38,544 bags acquired by Atlantic Commission Company it sold 13,627 bags as Canandian No. 1 seed potatoes to the Great Atlantic & Pacific Tea Company (plaintiff's Ex. B, R. 159, and R. 157), and the remaining quantity as Canadian No. 1 seed potatoes to fruit and vegetable wholesalers in the southeastern area (R. 48), some of whom were known by Atlantic Commission Company to customarily sell seed potatoes to farmers for planting (R. 60). The Great Atlantic & Pacific Tea Company, buyer of 13,627 bags from Atlantic Commission Company, customarily sold seed potatoes in its retail stores to home gardeners and planters of small commercial acreage (R. 58).

THE QUESTIONS PRESENTED

We do not agree with appellant's statement of the questions presented on page 2 of the petition, as will appear from the argument in this brief. Petitioner's phraseology indulges in some unwarranted assumptions as to the effect of the decision of the United States Court of Appeals, and it ignores the factual findings by the District Court and the points upon which the District Court directed a verdict in favor of the defendant.

ARGUMENT

So avid was the United States Court of Appeals to reach the broad questions concerning (1) the validity and application of the Trade Agreement, and (2) whether a right of action for damages existed in favor of the United States if private parties acted in opposition to its objects, that such Court dismissed with scant courtesy the determinations of the District Court which had been made at the conclusion of the plaintiff's evidence (a) that the evidence failed to show that respondent had diverted or reconsigned the potatoes for use as table stock, and (b) even if such diversion or reconsignment had occurred plaintiff did not thereby sustain damage. On these primary points, it said only (204 F. 2d 658):

> "We have little difficulty in seeing in the evidence breach of contract on the part of defendant and damage resulting to the United States from the breach."

Despite its disposition to treat these important questions thus lightly, we submit that the conclusions of the District Court were eminently sound and they require the attention of this Court. *Walling* v. *General Industries Co.*, 330 U. S. 545; *Public Service Commission of Puerto Rico* v. *Havemeyer*, 296 U. S. 506; *Story Parchment Co.* v. *Patterson Parchment Paper Co.*, 282 U. S. 555.

We shall proceed to deal with the four defenses which respondent has presented in two courts, and the several branches of those defenses, in the following order:

1. The Trade Agreement;
2. Absence of a Cause of Action;
3. Defendant Breached No Contract Which Had Been Created by the Trade Agreement; and
4. Plaintiff Sustained No Damages.

(1) THE TRADE AGREEMENT—

In the petition for certiorari at page 11 it is said that the initial ruling below was that the President, without Congressional authorization, cannot consummate an international agreement which regulates foreign commerce because that field is reserved by the Constitution to Congress. Such assertion imports to the opinion of the Court of Appeals a somewhat broader scope than the record seems to justify. True it is that in discussing the question which had been posed, the Court said at 204 F. 2d 659:

"It is argued, however, that the validity of the executive agreement was not dependent upon the Act of Congress but was made pursuant to the inherent powers of the President under the Constitution. The answer is that while the President has certain inherent powers under the Constitution, such as the power pertaining to his position as Commander in Chief of Army and Navy and the power necessary to see that the laws are faithfully executed, the power to regulate interstate and foreign commerce is not among the powers incident to the Presidential office, but is expressly vested by the Constitution in the Congress."

However, in completing its discussion of the question that Court declared the genesis of its decision on the point at page 659 in the following language:

"We think that whatever the power of the Executive with respect to making executive trade agreements, regulating foreign commerce, in the absence of action by Congress it is clear that the Executive may not through entering into such agreement avoid complying with a regulation prescribed by Congress. Imports from a foreign country are foreign commerce subject to regulation, so far as this country is concerned, by Congress alone. The Executive may not by-pass Congressional limitations regulating such commerce by entering into an agreement with the foreign country that the regulation be exercised by that country through its control over exports. Even though the regulation prescribed by the executive agreement be more desirable than that prescribed by Congressional action, it is the latter which must be accepted as the expression of national policy."

With propriety, it may be here pointed out that the Trade Agreement in no sense related to "foreign commerce" as that term is commonly understood, that is to say, to the disposition of commodities produced in the United States outside of the boundaries of the country, but the concern of the United States in attempting to enter into such an agreement was directed solely to the quantity of potatoes arriving in this country (R. 78, 153, 156), a matter of internal concern and one with which the Congress had dealt in specific terms.

Of course, when the Congress authorized a support price for potatoes it was fully conscious of the fact that imports from Canada might deprive an equivalent quantity of American grown potatoes of a public market and thus result in their purchase by Commodity Credit Corporation (Petition for Certiorari page 4, and Sec. 22 Agricultural Adjustment Act), but the legislative determination was that if this should occur, nevertheless the executive branch should not place any quantitative limitations on imports except after (1) an investigation by the United States Tariff Commission, and (2) the quantitative limitation on commodities imported for consumption should not exceed 50% of the quantity imported for cunsumption during a prior representative period. Admittedly there was no pretense of compliance with any of the requirements prescribed in the statute.

Again, the Congress had taken cognizance of the propensity of the executive branch of the Government to enter into trade agreements which might adversely affect American importers with business similar to this

respondent, and by the Tariff Act of 1930 (19 U. S. C. A. 1351 et seq.), referred to in Section 22 of the Agricultural Adjustment Act of 1948, it had placed specific restrictions on the manner in which trade agreements of the nature of the one here under consideration may be entered into. It is there provided that before any such may be consummated reasonable public notice of the intention to negotiate such agreement with the foreign power shall be given, in order that any interested person may have the opportunity to present his views to the President or to such agency as the President may designate, and that before concluding such agreement the President shall request the Tariff Commission to make an investigation and report with its findings. It is there further provided that within 30 days after the making of any such agreement the President shall transmit to the Congress a copy of the agreement together with his reasons for the action taken. Obviously these statutory provisions were intended to reserve to Congress an opportunity for review of any such executive action and the last word as to the propriety thereof. The pertinent sections of the Tariff Act of 1930 are 1354, 1357(a) and (b), 1358, and 1359(a) and (b). Appellant admits that there was no compliance with any of such requirements.

The trade agreement evidenced by the exchange of notes dated November 23rd, 1948 was a clear attempt to circumvent these limitations and restrictions which had been prescribed by statutory law. In view of the statutory provisions for the manner in which imports could materially interfere with a program, or with the operations, of the Department of Agriculture can be quantitatively limited, it seems clear that there is no

independent authority for the Department of Agriculture (or the Department of State) to limit imports in any other manner. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388; *Helvering* v. *Powers*, 293 U. S. 214 at 224; *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599.

The subject is epitomized by Mr. Justice Jackson in his concurring opinion in *Youngstown Sheet & Tube Co.* v. *Sawyer*, supra, where he said:

> "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."

In no sense do we take issue with the assertion found at the bottom of page 11 and the top of page 12 of the petition that a national government is vested with all of the powers of government necessary to maintain an executive control of international relations, but this assertion and the cases cited by petitioner on that point beg the question at issue. No executive agreement was involved in *Burnet* v. *Brooks*, 288 U. S. 378, and this Court was there dealing solely with the question whether Congress had power to impose a tax on property within the United States which was owned by a foreign decedent at the time of his death. In

United States v. *Curtiss-Wright*, 299 U. S. 304, there was express congressional authority for a Presidential proclamation prohibiting the sale of arms in the United States to Bolivia, and there the subject matter related exclusively to the external affairs of the United States (see Headnote Section 47). In the *Belmot* and *Pink* cases, the United States was not a party litigant in its sovereign capacity but as a direct assignee of a right existing in the Soviet Union. The other cases there cited have no force on the question under consideration.

With the object of reducing the quantity of Canadian grown potatoes coming into the United States, there was no pretense of any compliance with the Congressional Acts, no investigation, no notice to the public, no opportunity to interested parties for a hearing, no Presidential proclamation, nor even any claim that the exchange of notes was ever brought to the attention of the President.

(2) Absence of a Cause of Action—

For the courts to entertain an action for damages, the plaintiff must assert a right of action arising under the common law or under some constitution or statute. The reported cases in which the United States has brought actions for damages have been exceedingly few, and have been limited to actions by the United States as a direct contracting party principal against another party principal on contracts which the United States was authorized by law to make. In those cases the United States does not occupy the position of a sovereign power but has the same position as a private party litigant. See *Dugan* v. *United States*, 2 Wheat

(U. S.) 172, 4 L. Ed. 363; *Dollar Savings Bank* v. *United States*, 19 Wall. (U. S.) 27, 22 L. Ed. 80; *Bain* v. *United States*, 93 U. S. 642, 23 L. Ed. 997. The United States as a sovereign cannot exact money from its citizens in any manner except as authorized by law and there is no law which authorizes this attempted exaction.

The statute referred to in the complaint, 28 U. S. C. 1345, does no more than confer jurisdiction on the District Courts as to actions brought by the United States when such actions are authorized by some other law. We do not dispute the principle that the United States "has as much right as any citizen to maintain an action to redress a violation of its contract rights", where the contract rights asserted are founded upon some statute or authority which empowers it to contract through an agent or representative. In the motion to dismiss, it was asserted in Paragraph 7 that for any monies expended by the Department of Agriculture in carrying out its price support program there is no warrant nor authority in law for their recovery by an action of this nature. The situation bears a close analogy to that presented in *United States* v. *Standard Oil Co. of Calif.*, 332 U. S. 301, 91 L. Ed. 2067, where the facts were that John Etzel, a soldier, had been hit and injured by a truck of the Standard Oil Company of California. He was hospitalized at Government expense and his soldier's pay continued during disability. The United States brought an action against the tortfeasor to recover the amounts expended for hospitalization and soldier's pay and for loss of Etzel's services. Such an action was not authorized by any Federal statute, and plaintiff sought to sustain it upon the theory that the common law liability of the tort-

feasor established a right of action in those who had paid out money by reason of his act. Recovery was refused, and in the opinion beginning at page 2075 of 91 L. Ed., it was said:

> "Moreover, as the Government recognizes for one phase of the argument but ignores for the other, we have not here simply a question of creating a new liability in the nature of a tort. For grounded though the argument is in analogies drawn from that field, the issue comes down in final consequence to a question of federal fiscal policy, coupled with considerations concerning the need for and appropriateness of means to be used in executing the policy sought to be established. The tort law analogy is brought forth, indeed, not to secure a new step forward in expanding the recognized area for applying settled principles of that law as such, or for creating new ones, it is advanced rather as the instrument for determining and establishing the federal fiscal and regulatory policies which the Government's executive arm thinks should prevail in a situation not covered by traditionally established liabilities.
>
> *Whatever the merits of the policy, its conversion into law is a proper subject for congressional action, not for any creative power of ours. Congress, not this Court, or the other federal courts, is the custodian of the national purse. By the same token it is the primary and most often exclusive arbiter of federal fiscal affairs. And these comprehend, as we have said, securing the treasury or the government against financial losses however inflicted, including requiring reimbursement for injuries creating them, as well as filling the treasury itself.*

However, Congress without doubt has been conscious throughout most of its history that the government constantly sustains losses through the

tortious or even criminal conduct of persons interfering with federal funds, property and relationships. We cannot assume that it has been ignorant that losses have long arisen from injuries inflicted on soliders such as occurred here. The case, therefore, is not one in which, as the Government argues, all that is involved is application of a 'well settled concept of legal liability to a new situation, where that new situation is in every respect similar to the old situation that originally gave rise to the concept'. Among others, one trouble with this is that the situation is not new, at any rate not so new that Congress can be presumed not to have known of it or to have acted in the light of that knowledge.

When Congress has thought it necessary to take steps to prevent interference with federal funds, property or relationships, it has taken positive action to that end. We think it would have done so here, if that had been its desire. This it still may do, if or when it so wishes.

In view of these considerations, exercise of judicial power to establish the new liability not only would be introducing within a field properly within Congress' control and as to a matter concerning which it has seen fit to take no action. To accept the challenge, making the liability effective in this case also would involve a possible element of surprise, in view of the settled contrary practice which action by Congress would avoid, not only here but in the many other cases we are told may be governed by the decision.

Finally, if the common law precedents relied on were more pertinent than they are to the total problem, particularly in view of its federal and especially its fiscal aspects, in none of the situations to which they apply was the question of liability or no liability within the power of one of

> the parties to the litigation to determine. In them the courts stood as arbiters between citizens, neither of whom could determine the outcome or the policy properly to be followed. Here the United States is the party plaintiff to the suit. And the United States has power at any time to create the liability. The only question is which organ of the Government is to make the determination that liability exists. That decision, for the reasons we have stated, is in this instance for the Congress, not for the courts. Until it acts to establish the liability, this Court and others should withhold creative touch." (Italics supplied).

On this same subject, appellant founds its position on the assertion at page 24 of the petition that "no specific authorization is required for the judical enforcement of a contractual right of the United States." Such a statement is acceptable as a broad generality, but it requires some scrutiny against the factual situation presented by this case. Assuming the validity of the Trade Agreement for discussion of this branch of the case, we find that the direct contracting parties were Canada and the United States. By its terms, Canada agreed (1) that it would grant export permits only to Canadian exporters who could give evidence that they had firm orders from legitimate United States users of Canadian seed potatoes, and (2) that such Canadian exporters would also be required (by Canada) to have included in any contract in which they might enter with a United States seed potato importer a clause in which the importer would give an assurance that the potatoes would not be diverted or reconsigned for table stock purposes (R. 153, 154). Here the purchase of Canadian No. 1 seed potatoes

was by respondent Guy W. Capps, Inc., from H. B. Willis, Inc. in Canada. The Canadian Government had not undertaken with the United States that it would exact any assurances from the American importer, but only that it would require the Canadian exporter to have included in his contract with the American importer a clause in which the American importer gave assurance against diversion or reconsignment for table stock purposes. It would seem that the contents of the telegram (Ex. 2, R. 151) was hardly a compliance by Canada with its second undertaking made to the United States, but if we assume that the Willis Company presented such telegram in order to obtain an export permit, and that the Canadian authorities accepted same as a compliance by the Canadian exporter with its requirements, then the result goes no further than a covenant by the American importer with the Canadian exporter that the commodities would not be diverted or reconsigned as table stock.

Petitioner views this representation from the respondent to the Willis Company, both being private parties customarily engaged in trade, as creating a contractual right of the United States. Our view is that according to established legal principles the transaction between these private parties did not establish a contractual right of the United States, since the United States had no direct contract with either the Canadian exporter or the American importer, and that the most favorable position which appellant can claim is that it is a beneficiary of this alleged contract term. As alleged in the complaint the contract was made in Canada (and certainly none existed until respondent's

telegram was delivered to the Canadian authorities, if it was so delivered), and under the law of that forum (and the English law) a third party beneficiary cannot maintain an action on a contract to which it is not a party even where the contractual instrument expressly provides that it shall have the power to sue thereon. *Pennsylvania Steel Co.* v. *N. Y. C. Ry. Co.*, 198 F. 721 at 749; 12 Am. Jur., Sec. 275, p. 822, Note 17.

If federal law governs in determining whether a non-party beneficiary may sue on a contract term, then that law is that an action cannot be maintained by the third party beneficiary unless (1) the part making the promise intended it to be for the sole benefit of the third party beneficiary, and (2) the contracting party making the promise and the contracting party to whom it was made intended to confer on the third party beneficiary the right to sue in damages for the breach of such promise; the federal law is further that these intentions will never be implied unless the nature of the transaction is such that the third party beneficiary asserting the cause of action is the only party interested in the promise, and the presumption is that the promise is only intended for the benefit of the party to whom it was made.

Here the record is devoid of any testimony to the effect that this respondent sent the telegram for the sole benefit of the United States, and it is likewise devoid of any testimony that the respondent and the Willis Company intended to confer on the United States the right to sue in damages for the breach of such promise. In the absence of testimony on these points, if we are permitted to indulge in assumptions the natural assumption from the record is that the

promise was for the benefit of the seller Willis Corporation and in order to permit it to consummate a transaction of sale for which it could not obtain an export permit in the absence of the telegram.

Under federal law, only those third party beneficiaries who fall within the category of "donee beneficiaries" or "creditor beneficiaries" can maintain an action, and "incidental beneficiaries" are not entitled to sue. Williston on Contracts, Vol. 2, Sec. 402, p. 1157. Here appellant is at most no more than an incidental beneficiary. See *Robbins Drydock & Repair Co.* v. *Flint*, 275 U. S. 393 at 397 bottom; *German Alliance Ins. Co.* v. *Home Water Supply Co.*, 226 U. S. 220; *Bryan Lumber & Supply Co.* v. *Page*, 109 Conn. 256, 146 A. 293, 294; *Percival* v. *Luce* (9th Cir. 1940), 114 F. 2d 774; *Re United Cigar Stores Co.* (2nd Cir. 1934), 70 F. 2d 313 at 316; *Pennsylvania Steel Co.* v. *N. Y. C. Ry. Co.*, 198 F. 721; *Austin* v. *Seligman*, 18 F. 522; 12 Am. Jur., Sec. 273 through 293; American Law Institute Contracts, Sec. 147.

If the posture of this action is ex delicto rather than ex contractu, then the following principle stated in 7 American and English Encyclopedia of Law and Procedure at page 110 is applicable:

> "It is well settled that a third party cannot maintain an action ex delicto for injuries resulting from a breach of contract between two other contracting parties, unless such third party sustains injuries from such breach for which he would have a right of action although no such contract had been made."

See also *Savings Bank* v. *Ward*, 100 U. S. 195; *Buckley* v. *Gray*, 110 Cal. 339, 52 Am. St. Rep. 88.

Petitioner asserts that the decision below is opposed to the principles laid down by the Court of Appeals for the Third Circuit in *United States* v. *LeRoy Dyal Co.*, 186 F. 2d 460, certiorari denied 341 U. S. 926, but it fails to distinguish the situation on the facts. In the Dyal case, the United States was a direct contracting party pursuant to a contract made by a governmental agency in pursuance of Congressional authority (186 F 2d 461).

(3) Defendant Breached No Contract Which Had Been Created by the Trade Agreement—

There was no diversion or reconsignment of the potatoes as table stock. Admittedly the time of the purchase by appellee was the time for planting of seed potatoes in Georgia and Florida and appellee customarily dealt in such seed in such season and in such area. Admittedly appellee sold the entire cargo as Canadian No. 1 seed potatoes to purchasers with whom it was previously accustomed to deal in a similar commodity in prior years. When appellee disposed of the cargo by sale, in the usual course of its business, it lost dominion and control over the commodity. In the District Court appellant never contended that it was appellee's duty to make certain that these seed potatoes were actually planted, but conceded that its only duty was not to divert or reconsign them as table stock. See Record 161, where Government counsel said:

> "The Government will rest upon two facts, that there was no restriction made upon that table use, and these dealers deal in table stock; the trade deals in table stock *as well as (in) seed potatoes.*" (Italics supplied).

If, as admitted in this case, the purchasers from Guy W. Capps, Inc., customarily dealt in seed potatoes as well as in table stock, how can it be successfully argued that a bare sale of Canadian No. 1 seed potatoes *as such* to those purchasers, supports the inference that the sale was a diversion or reconsignment for table stock as an immediate inference from the fact proved?

The fact proved was a resale by appellee to Atlantic Commission Company. Atlantic Commission Company was a dealer for resale in potatoes suitable for immediate eating and those suitable for immediate planting. Because it customarily bought potatoes suitable for immediate eating the appellant sought to draw the presumption that appellee's sale to it was a diversion or reconsignment for table stock, and it sought to draw this presumption on the theory that appellee knew or should have known that the Canadian No. 1 seed potatoes *might* thereafter be resold and consumed as food. From the circumstances (assumed by appellant) that appellee knew or should have known that the Canadian No. 1 seed potatoes might be resold by Atlantic Commission Company and ultimately consumed as food, appellant contends that appellee should be held to have itself intended that the Canadian No. 1 seed potatoes should be consumed as food.

Those contentions are contrary to established legal principles. In *Manning* v. *Insurance Co.*, 100 U. S. 683, it is held:

> "(a) It is error to submit to the jury to find a fact of which there is no competent evidence;
>
> (b) The only presumptions of fact which the law recognizes are immediate inferences from the facts proved." (Headnotes 2 and 3).

At page 698, in its opinion, the Court said:

"Remarking upon this subject in United States v. Ross (92 U. S. 281, 284), we said: 'Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves be presumed.' Referring to the rule laid down in Starkie on Evidence, page 80, we added: 'It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open and visible connection between the principal or evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. Best on Evid. 95. A presumption which a jury may make is not a circumstance in proof, and it is not, therefore, a legitimate foundation for a presumption. There is no open and visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption. Douglass v. Mitchell, 35 Pa. St. 440'."

See also *Westland Oil Co.* v. *Firestone Tire & Rubber Co.* (CA-8), 143 F. 2d 326 at 330; *Perillo* v. *United States* (CA-2), 164 F. 2d 645 at 646; *DeBaca* v. *Kahn* (CA-New Mexico), 161 P. (2d) 630 at 633, where in its opinion the Court said:

"The rights of the parties litigant may not be determined and adjusted upon mere inferences drawn from others. But, before the courts are authorized to act, there must be some evidence in the record of such tangible nature as would authorize the lower court whose duty it is to pass upon the facts to do so without basing its findings upon surmise, speculation or mere inferences."

In *Manning* v. *John Hancock Mut. Life Ins. Co.*, 100 U. S. 693, 697, 25 L. Ed. 761, it was said:

> "We do not question that a jury may be allowed to presume the existence of a fact in some cases from the existence of other facts which have been proved. But the presumed fact must have an immediate connection with or relation to the established fact from which it is inferred. If it has not, it is regarded as too remote. The only presumptions of fact which the law recognizes are immediate inferences from facts proved."

Respondent did no more than sell a recognized commodity in the previously established trade channels for disposition of such commodity, and in the District Court there was no testimony for appellant sufficient to show that a single bag of this cargo was ultimately eaten rather than planted.

(4) PLAINTIFF SUSTAINED NO DAMAGES—

The basis on which it is claimed that the United States has been damaged is (a) that these 48,544 bags of potatoes found their way to American tables shortly after their arrival at Jacksonville, with (b) the consequent result that the Department of Agriculture was compelled to buy an equal quantity from "eligible" American growers in order to comply with its contractual obligation to those growers whom it is said were thus deprived of a public market for 48,544 bags. In the District Court the Government's contention was pin-pointed (R. 125, 126, 127) by questions to Department of Agricultural witness Grange on the part of counsel and the Court as follows:

"Q. Well, suppose 48,000 bags were planted and 544 bags were eaten. Would it be your position that the only additional quantity the Government had to buy in consequence of which it suffered damage was the 544 bags?"

A. My position would be, our only claim would be on the 544 bags.

Q. It is true, then, that your claim depends as to a monetary amount, bag for bag, on what was used up by eating and what was used up by planting, corresponding to your theory of your claim?"

"THE COURT: That is the entire extent of your injury, that is for each potato that came in on the Gangway and was used for table purposes? Your view is that the Government suffered to that extent and only to that extent?"

THE WITNESS: I agree with that, Your Honor, yes, sir."

There was absolutely no testimony for the Government that any American grown potatoes which had been produced by "eligible" American growers were deprived of a market (displaced) by this quantity of 48,544 bags. In 1948 (and throughout the Price Support Program) "eligible" growers were those who voluntarily contracted with the Department of Agriculture for the price support umbrella, and they accounted for approximately 80% of the production within the country (R. 107), whereas 20% of the production within the country went to market unsupported by the Program. To the extent to which they were sold to the public the 20% displaced an equivalent quantity which the Government was obligated to buy, and there is no evidence to show whether potatoes imported from

Canada displaced a portion of the 80% grown in America which the Government was committed to buy or a portion of the 20% which was grown in America which the Government was not committed to buy.

Additionally, by the terms of the Agricultural Adjustment Act, the Department of Agriculture could have had no undischarged commitment at June 9th, 1949 for the American crop grown in 1948 because the entire 1948 crop had been harvested prior to that date. Its commitment for the crop grown in America during 1949 had not been made (R. 109). The Trade Agreement could have no effect on the 1949 crop grown in America because such Agreement expired according to its terms at June 20th, 1949 (R. 136).

Although the Court of Appeals said in its opinion "We have little difficulty in seeing in the evidence . . . damage resulting to the United States from the breach . . . ", we respectfully submit that such Court never gave any careful consideration to the proof relating to damages and that the conclusion reached by the District Court on this subject is irrefutable. As our final representation on this subject, we urge that it is conclusive against appellant's contention that the United States was damaged if this cargo of potatoes imported by Guy W. Capps, Inc. was eaten rather than ultimately planted as seed, because if these 48,544 bags ever displaced any American grown potatoes (as to which there is no proof) they displaced an equivalent quantity of American grown potatoes whether eaten immediately after their arrival in this country or planted as seed, and disbursements by the Department of Agriculture by reason of their importation was in like amount in either event. The testimony of appellant's

witness Grange at R. 112, now here set forth for the convenience of the Court, is conclusive on the question:

> "Q. Isn't this also true, if those 48,544 bags were every one planted, did they not displace an equal quantity of American grown seed potatoes?
>
> A. Yes, sir."

The displacement, causing additional purchases by the Department of Agriculture, if any ever occurred, was by reason of entry of potatoes into the United States and not by reason of the use of such potatoes after their arrival.

On this subject, *United States* v. *LeRoy Dyal Co.*, 186 F. (2d) 460 (cited by appellant at page 25 of the petition to support the contention that the courts will enforce a contractual right of the United States) is of considerable interest. There, the defendant contracted directly in writing with a Government agency to purchase potatoes in its behalf under the Price Support Program of 1947, and to buy in behalf of the United States only potatoes produced by eligible growers. The Government agency inserted as a contract term a provision for payment of $3.00 per hundredweight as liquidated damages if the dealer purchased potatoes from an ineligible dealer. Unwittingly, the defendant contracting party purchased 367,400 pounds from a farmer who was not an eligible grower, with the result that monies appropriated as a subsidy for eligible growers were thereby paid to this ineligible grower. The Court properly recognized in that action that the United States could recover no damages in the absence of a contract provision for liquidated damages, and the

underlying question was whether the contract provision for liquidated damages could be enforced in the absence of specific proof that damages had occurred.

CONCLUSION

For the reasons stated herein, we feel that the judgment below in favor of the respondent is manifestly right, that no certiorari should be awarded, and that if this Court shall consent to review such judgment it should be affirmed.

Respectfully submitted,

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